Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-159

RALPH DELLIGATTE,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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v.

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JURISDICTION

The judgment of this Court of Appeals for the Second Circuit was entered on May 18, 1979. A timely petition for rehearing with a suggestion for rehearing en banc was denied by the Court of Appeals on June 29, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. section 1254(1).

QUESTION PRESENTED

Whether the giving of the interested witness charge to the jury after the defendant testified on his own behalf denied him due process?

CONSTITUTIONAL PROVISION INVOLVED

U.S. Constitution, Fifth Amendment:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW RAISES AN IMPORTANT AND SUBSTANTIAL ISSUE RELATING TO THE PROPRIETY OF THE GIVING OF THE INTERESTED WITNESS INSTRUCTION AFTER A DEFENDANT HAS TESTIFIED ON HIS OWN BEHALF.

The propriety of the giving of the interested witness charge has not been decided by this Court. There is a long line of cases in the Second Circuit cogently criticizing this charge under any circumstances and especially so when, as here, it is given without any blancing language. It is in the best interests of all parties that where possible the testimony of a defendant be given. The interested witness charge is an antiquated and unnecessary charge which places an unneeded burden on a defendant's choice whether or not to testify. This court should grant this writ and prohibit the giving of this instruction because it violates due process, needlessly keeps witnesses off the stand, and serves no useful purpose.

A. The Charge Given Was Not Balanced

The charge given by the trial court states:

> Although defendant need not defend himself or choose to become a witness for himself at the trial, if he chooses to do so, the same test that applied to any other witness applies to him. *Among others these tests are his personal interest in the verdict* and his personal motives for testifying.* (301a) (Emphasis supplied).

The charge omits entirely the balancing language** suggested by the Second Circuit in *United States v. Rucker,* 586 F.2d 899 (2d Cir. 1978); *United States v. Floyd,* 555 F.2d 45 (2d Cir. 1977) and *United States v. Schlesinger,* Dkt. No. 78-1375 Slip op. p. 2265 (2d Cir. April 19, 1979).

It cannot be argued that, in fact, the instruction is balanced because it states that a testifying defendant's credibility should be judged by the same tests as any other witness. In the circumstances of this case, this language is no balancing at all. In this case, the only witness who had such an interest was Delligatte. No government witnesses were vitally interested in the outcome in the same sense as Delligatte. Thus there is a uniqueness about Delligatte's interest which sets him apart from the other witnesses and makes the interest charge applicable only to him. In this case, the balancing is illusory.

It is true, that under some circumstances this language is of some value in balancing the impact of this charge. In *United States v. Schlessinger, supra,* similar language was employed and the Second Circuit considered it as some balancing language. However, in *Schlessinger,* other co-conspirators testified for the government and the jury could evaluate their motives in testifying as making them interested parties in the same sense as the defendants. Here no co-conspirators testified for the government, only agents.

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* References are to Appellants' joint appendix below.

** A defendant's vital interest in the outcome of his trial is not inconsistent with the ability to render truthful testimony

It is true, that the language employed by the Court below was temperate, but temperate or not, its message was clear. Once the jury is instructed that they may be suspicious of a witnesses' testimony just because he is a defendant, it makes little difference whether the language informing them of this is weak or strong. The real issue is whether the language clearly calls into question a defendant's testimony solely because he is a defendant.

It is Delligatte's position that the charge given was not balanced and this was error which resulted in a denial of due process.

B. There Was No Waiver

Defense counsel below objected to the giving of any charge on the subject. This objection was overruled. Below, the government placed great stress on the fact that after overruling the objection, the Court asked counsel for a suggested charge on the issue. From the failure of counsel to supply such a proposed charge, the government implied a waiver of the issue. However, in the context of the dialogue between Court and counsel, the failure to supply a proposed charge was not a waiver (Appendix "A").

It was correct for counsel to object to this charge in its entirety. The Second Circuit, in *Schlessinger,* has stated that the need for such a charge is questionable. Slip. op. at 2275. Also, *United States v. Vega,* 589 F.2d 1147 (2d Cir. 1978) (concurring opinion of Guerfein, J.; concurred in by Oakes, J.)

After the trial court overruled the objection, it stated that the charge it would give would " . . . be a balanced charge as the Second Circuit charge."* Counsel was entitled to rely on the Court's assurance that the charge it would give would be balanced in the manner suggested in Second Circuit opinions. Under

* p. 315 of the minutes of trial.

these circumstances, defense counsel cannot be deemed to have waived this issue.

C. The Error Was Not Harmless

The critical evidence against Delligatte was the testimony of one witness, under cover agent Fortaza. Certainly, this is not overwhelming proof of guilt. Moreover, Delligatte testified. Where a defendant places before the jury a plausible explanation of his actions other than guilt, the harmless error doctrine must be applied differently. For in the absence of a defendant's case, the jury may be permitted to draw inference from prosecution evidence which would be impermissible if the defendant presented an exculpatory version. *United States v. Frank,* 494 F.2d 145 (2d Cir. 1974).

D. This Court Should Prohibit The Giving Of This Charge

This charge is an antiquated and unnecessary one. It is dangerous and places an unneeded burden upon a defendant's choice to testify or not. The vice of such a charge is apparent and has been noted by many Courts in a number of cases over a long period of time. *United States v. Mahler,* 363 F.2d 673 (2d Cir. 1966).

In *United States v. Floyd, supra,* the Second Circuit stated appropriate balancing language and that inclusion of such language was preferable. In *United States v. Vega, supra,* this charge was again criticized, with two judges indicating that the giving of this charge was plain error but that they felt bound by *United States v. Rucker,* 580 F.2d 899 (2d Cir. 1978), which stated that it was not plain error.

In *United States v. Schlessinger, supra,* the Second Circuit criticized this charge, "we . . . question the need for any instruction as to the effect the defendant's interest may have on his credibility . . . ."

In light of this long line of cases critical of this charge and the awareness of the Court below of them, this case is a proper one for this court to abolish this charge and to reverse Delligatte's conviction and grant him a new trial.

CONCLUSION

FOR THE ABOVE REASONS THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Dated: July 24, 1979
New York, New York

Respectfully submitted,

J. JEFFREY WEISENFELD
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APPENDIX "A"
EXCERPTS FROM MINUTES

* * *

evidence and direct evidence.

THE COURT: No, you don't find it in my charges. I don't give them. There is no legal distinction between the two. It is totally confusing. All evidence is in effect circumstantial.

MR. KRITZER: My only suggestion was that, in other words, your Honor doesn't even want to discuss circumstantial or direct evidence at all?

THE COURT: I don't.

MR. KRITZER: The Government had two requests to charge. The first was with respect to the gun, and the second one was a flight charge with respect to the defedant Robert Masucci. I believe this case is appropriate to have a flight charge.

THE COURT: No. You will argue that. I think that emphasizes the circumstantial evidence unduly. You can argue it fully. I am not going to do that. If I were to sum up all the evidence I'd do that, but I am not going to.

MR. KRITZER: Might I ask you to include some indication to the jury that they can find guilt beyond a reasonable doubt based upon circumstantial evidence?

THE COURT: I will not. There is one charge that is when a defendant testifies it should be—his testimony should be construed carefully and so on. Don't you want that charge?

MR. KRITZER: Yes. I would like that.

THE COURT: You can have that.

MR. BORG: Obviously I don't want such a charge but I think the language should not include what you would have included for an accomplice.

THE COURT: No. It should be a balanced charge as the Second Circuit says.

MR. BORG: Not telling the jury that the defendant's testimony should be viewed with great caution as you would an accomplice.

THE COURT: I will use the Second Circuit charge. If you have a charge you want me to use I will consider it.

MR. BORG: I didn't think you were going to charge that.

THE COURT: What makes you think I wasn't going to charge it?

MR. BORG: With qualifying the defendant's testimony other than having an interest in the outcome of the case.

THE COURT: Well, that's the charge. Do you have language? Give it to me. I will use it.

MR. BORG: No, your Honor.

APPENDIX "B"
ORDER

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-ninth day of June, one thousand nine hundred and seventy-nine.

Present:

HONORABLE JAMES L. OAKES
HONORABLE ELLSWORTH VANGRAAFEILAND
HONORABLE J. JOSEPH SMITH

Circuit Judges.

UNITED STATES OF AMERICA,

Appellee,

v.

RALPH DELLIGATTE,

Appellant.

Petition for a rehearing having been filed herein bu counsel for the Appellant.

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

A. DANIEL FUSARO, Clerk

EXHIBIT "C"
ORDER

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-ninth day of June, one thousand nine hundred and seventy-nine.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

RALPH DELLIGATTE,

Appellant.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the Appellant, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

s/Irving R. Kaufman
IRVING R. KAUFMAN
Chief Judge